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Supreme Court, U.S.

No. 97-_____ 97 1240 JAN 26 1998

In the

OFFICE OF THE CLERK

Supreme Court of the United States

October Term, 1997

Seth Berner

Petitioner

v.

Judge Thomas E. Delahanty, II

Respondent

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

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18 pp

QUESTIONS PRESENTED

1. Whether the court of appeals too rigidly relied on public forum doctrine, in defiance of this Court's ruling in *Board of Airport Commissioners v. Jews for Jesus*, to approve the banning, by a state court judge, of a nonobtrusive, nondisruptive political button.

2. Whether a state judge's unwritten, *ad hoc* policy of banning political buttons in his courtroom unconstitutionally vests unlimited discretion in a government official to suppress core protected speech.

3. Whether, notwithstanding state judges' broad authority to establish rules of conduct in their courtrooms, a judge violates the First Amendment when he bans the wearing of a political button in the absence of any risk of interference with decorum or the fair administration of justice.

4. Whether the court of appeals wrongly justified the suppression of a political message, unrelated to any pending judicial proceeding, worn on a lapel button by a person properly present in a public courtroom, by attributing the message to the state and then asserting that the suppression was necessary to avoid "the appearance of favoritism in judicial proceedings."

QUESTIONS PRESENTED (continued)

5. Whether an individual forced by a state court judge to remove a political lapel button bearing a message of opposition to an upcoming referendum question should have an opportunity to prove that the judge's order was unconstitutionally viewpoint-based, where he alleges that the judge permitted military, fraternal and religious symbols to be worn by others in the same courtroom.

PARTIES TO THE PROCEEDING

The petitioner is Seth Berner, a resident and citizen of the State of Maine. The respondent is Thomas E. Delahanty II, a judge of the superior court of the State of Maine.

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Seth Berner
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Judge Thomas E. Delahanty, II
Respondent

PETITION FOR A WRIT OF CERTIORARI

Seth Berner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a) is reported at 129 F.3d 20 (1st Cir. 1997). The opinion of the district court (Pet. App. 23a) is reported at 937 F.Supp. 62 (D. Me. 1996).

JURISDICTION

The judgement of the court of appeals was entered on October 28, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, in relevant part:

> Congress shall make no law . . . abridging the freedom of speech . . .

The Fourteenth Amendment to the United States Constitution provides, in relevant part:

> No state shall . . . deprive any person of life, liberty, or property, without due process of law . . .

STATEMENT OF THE CASE

Petitioner, Seth Berner, is a member in good standing of the Bar of the State of Maine. Pet. App. 29a. Respondent, Thomas Delahanty, is a judge of the Superior Court of the State of Maine. Pet. App. 29a. In late October, 1995, Berner was seated in the gallery of respondent's courtroom, awaiting his turn to appear in a pending case. Pet. App. 29a. Respondent summoned

petitioner to the bench, and asked him to remove from his lapel a button which urged defeat of an initiative soon to be voted on by Maine voters.[1] Pet. App. 30a. When Berner questioned the basis for such a demand, Judge Delahanty responded: "Not in the courtroom. We don't take sides." Pet. App. 3a. The message on the button had caused no notice or comment, and court business had been proceeding in an orderly fashion. Pet. App. 4a, 29a-30a.[2]

Petitioner removed the button under protest, believing that he would be held in contempt if he did not. Pet. App. 3a. Later that day, in chambers, Judge Delahanty stated that he was uncertain whether he had the authority to ban political buttons, but that he intended to continue to do so in his courtroom unless ordered to do otherwise by a higher authority. Pet. App. 30a. Respondent has in the past allowed in his courtroom the wearing of other message-bearing insignia, such as religious symbols, and symbols for the armed forces or fraternal orders. Pet. App. 30a. Several months later, in response to an inquiry from the Maine Civil Liberties Union, the Chief Justice of the Maine Supreme Judicial Court wrote that there were no court rules applicable to the situation, and that "[t]he power of contempt affords [judges] wide discretion in regulating conduct within the courtroom." Pet. App. 37a. (Exhibit C to complaint.)

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[1]The initiative would have prohibited extension of civil rights protections on the basis of sexual orientation.

[2]These and other facts are taken from the complaint or the decision of the court of appeals.

Petitioner filed suit in the United States District Court for the District of Maine, claiming abridgment of his freedom of expression in violation of 42 U.S.C. §1983, and seeking declaratory and injunctive relief. Pet. App. 28a. The district court dismissed the complaint for failure to state an actionable claim, assuming (but not deciding) that petitioner had standing. Pet. App. 23a.

The district court accepted the parties' view of the courtroom as a non-public forum, and reasoned that since (in its view) the restriction was neither unreasonable nor viewpoint-based, Berner's First Amendment claim must fail. Pet. App. 24a-27a.[3] The Court of Appeals for the First Circuit affirmed the dismissal, ruling that standing did exist, but holding that petitioner had failed to state a substantial constitutional claim on the merits. Pet. App. 7a-22a.

The court of appeals accepted the parties' characterization of the courtroom as a nonpublic forum, but clearly recognized that petitioner "adequately alleges infringement of a constitutionally protected form of expression -- the . . . right to advocate a particular political position by wearing an emblem." Pet. App. 14a. Nonetheless, the court of appeals found ample justification for such a ban in the trial judge's wish to keep his courtroom free of "the appearance of political partiality." Pet. App.

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[3]Although some factual submissions were made by both sides, the court granted respondent's motion to dismiss without reference to any facts beyond those alleged in the complaint.

15a. Such a prohibition, said the First Circuit, serves to avoid any harm that might result from "a lawyer's injection of private political viewpoints into the courtroom." Pet. App. 15a. (The court of appeals mistakenly assumed that respondent's ban on political buttons was limited to attorneys; petitioner's complaint (¶ 16) alleges that the declared policy was to ban *all* political buttons, whoever might display them. Pet. App. 30a.)

The court of appeals attempted to distinguish *Board of Airport Comm'rs v. Jews for Jesus*, 482 U.S. 569 (1987), on the grounds that an airport is different from a courtroom, and that the "First Amendment Free Zone" invalidated in *Jews for Jesus* was broader than Judge Delahanty's ban on political buttons. Pet. App. 16a-17a. Finally, the court of appeals rejected petitioner's claims that the ban was selective in application or viewpoint-based in its effect. Pet. App. 18a-21a.

REASONS FOR GRANTING THE WRIT

The ban that petitioner challenges in this case forbids core political speech. The court of appeals noted at the outset that the complaint "adequately alleges infringement of a constitutionally protected form of expression -- the . . . right to advocate a particular political position by wearing an emblem." Pet. App. 14a. The balance of the opinion, sustaining the ban despite its unmistakable effect and lack of any genuine justification, proceeds on several highly tenuous assumptions, and directly conflicts with the rulings of this Court in *Board of Airport Comm'rs v. Jews for Jesus*, 482

U.S. 569 (1987); *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991); and a number of cases which reject governmental attempts to justify curbing private speech on the ground that such speech might be attributed to the state.

First, the court of appeals treated respondent's order as though it were an established rule of court, sharply framed and capable of precise application and interpretation, when in fact the ban was an *ad hoc* ruling of a single judge in response to a situation which occurred in his courtroom, and which he wished to address without benefit of a general policy. This startling lack of clarity is not simply an abstract or cosmetic concern, for in the absence of any definition of what persons the ban might cover, universal coverage is the only plausible inference. Indeed, petitioner's allegation that the ban is infinite in scope has been conceded, *arguendo*, by respondent's motion to dismiss in the district court. Pet. App. 25a. To what extent jurors, witnesses, or other spectators, in addition to attorneys, might also have incurred respondent's displeasure by baring their political views in his courtroom, one can only speculate.

Equally unclear is what insignia, other than the very button at issue, fall under the ban. Petitioner alleged that the policy was selective in its scope because respondent "routinely permitted the wearing in his courtroom of other ornamentation supporting causes, such as crucifixes and insignia for armed forces or fraternal orders." Pet. App. 30a. Respondent's pleading in the federal courts, of course, assumes the validity of this claim -- and thus effectively concedes that the type of message petitioner displayed had been singled out for disadvantageous treatment. Petitioner

ought at least to have his day in court to demonstrate the selectivity of an *ad hoc* ban which, as far as the record shows, has been invoked against one and only one political message. Any other result violates the well-established rule that vague, overly discretionary policies permitting government officials to exercise arbitrary and discriminatory control over political speech are unconstitutional. *See Forsyth County v. The Nationalist Movement*, 505 U.S. 123 (1992).

The court of appeals too rigidly relied on public forum analysis to reach the wrong result in this case -- a result in clear conflict not only with *Jews for Jesus*, but with the conclusions of other circuits. *See United States v. Gilbert*, 920 F.2d 878, 886 (11th Cir. 1991); *Smith v. United States*, 502 F.2d 512, 518-19 (5th Cir. 1974). As Justices of this Court have noted, overly wooden use of public forum doctrine can sometimes obscure rather than illuminate the First Amendment values at issue. *See International Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672, 693-94 (1992) (Kennedy, Blackmun, Stevens, and Souter, J.J., concurring).

Finally, the First Circuit assumed that the display of this message so seriously endangered the appearance of impartiality that only its removal would protect the conduct of judicial business. Pet. App. 16a. On the record, it is not clear that anyone other than respondent even recognized petitioner, sitting in the gallery, as an officer of the court -- much less that anyone would have felt the impartiality of that court to be potentially tainted by allowing a single spectator to display a political button. The court of appeals'

assumption that the political views of Mr. Berner or any other private citizen could be attributed to the government, thus compromising the appearance of judicial impartiality, defies common sense, and conflicts with rulings in at least two circuits, as well as numerous Establishment Clause decisions of this Court.

I. THE CHALLENGED BAN FORBIDS FULLY PROTECTED EXPRESSION ON THE INDIVIDUAL JUDGMENT OF A PUBLIC OFFICIAL.

Two basic points frame the issue. First, there can be no doubt about the fully protected character of petitioner's speech -- the right to advocate a particular political position by wearing an emblem -- under the First Amendment. The court of appeals properly cited *Jews for Jesus*, 482 U.S. at 576, and *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 505-06 (1969) for that conclusion. Pet. App. 14a. *See also First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 776-77 (1978) (core political speech is "at the heart of the First Amendment's protection"); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995) ("No form of speech is entitled to greater constitutional protection" than speech on an upcoming referendum question). Just as with classic prior restraints, a ban on such protected speech comes to this Court bearing a heavy presumption against its validity. This is especially true where the form of speech is a silent, nondisruptive, highly personal, and inexpensive

political button. *Cf. City of Ladue v. Gilleo*, 512 U.S. 43, 54-57 (1994) (noting the unique importance of cheap, convenient, and highly personal forms of speech such as signs in home windows).

The second point is equally well settled: While courtrooms are undeniably different from streets and sidewalks, the First Amendment applies to judges who curb or restrain speech just as it does to the actions of other public officials. *See Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976); *Wood v. Georgia*, 370 U.S. 375 (1962), *Bridges v. California*, 314 U.S. 252 (1941). Spectators in a courtroom, and even attorneys, are not without First Amendment protection. *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991). Moreover, while a courtroom is indeed a special place, where judicial discretion is broad, and speech may be regulated, the First Amendment still requires some factual basis to find that a restraint on quiet, nondisruptive speech is needed to preserve decorum or the fair administration of justice.

No public officials, including judges, enjoy unfettered discretion in restraining protected speech. At least since *Hague v. Comm. for Indus. Org.*, 307 U.S. 496 (1939), and through *Forsyth County v. The Nationalist Movement*, 505 U.S. 123 (1992), this Court has consistently held that the possibility of censorship through uncontrolled discretion is fatal to the exercise of governmental power.

Such unfettered discretion is a central issue in this case. There was no suggestion that the petitioner violated any rule of court barring the display of political insignia. Nor was there any hint that his appearance somehow

breached basic norms of courtroom decorum -- as might an attorney, even seated in the gallery, coming to court in a bathing suit and bare feet. While the record does not set forth the rules of the Superior Court of the State of Maine, respondent's own candid reply to petitioner's challenge conceded the absence of any preexisting regulation or proscription. Pet. App. 3a, 30a, 36a.[4] It was, quite simply, respondent's personal view that lawyers (and even spectators) ought not to "take sides" in his courtroom, even through the silent wearing of a small lapel button. Pet. App. 36a.

Whether the superior court might have promulgated by formal process a rule that addressed such concerns, and gave guidance to attorneys, is a relevant issue; indeed, the very possibility of dealing in that way with the situation at hand highlights the arbitrariness, informality, and *ad hoc* nature of the ruling petitioner challenges here.

This Court's insistence on laws and regulations as the basis for regulating expression serves several values. For one, as we have just noted, pre-existing declarations of policy reduce sharply the exercise of unfettered discretion. Equally valuable, declared standards offer vital guidance to people whose speech may be affected by government action or policy. Without rules, the chilling effects of informal action are greatly magnified. *See Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963). The court of appeals, while addressing the standing issue, acknowledged the risk that

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[4]The letter from the Chief Justice of Maine also conceded as much. Pet. App. 37a-38a.

"other attorneys will refrain from expressing opinions by wearing political paraphernalia when appearing before this judge." Pet. App. 10a. This risk is greatly magnified by the conceded uncertainty of the scope of a ban that "apparently applies to every court officer." *Id.* Further, on the facts alleged, the ban applies to every person present in the courtroom. Pet. App. 30a.

Finally, in the absence of law or rules, appellate review of First Amendment claims becomes elusive. This case graphically illustrates that quandary. Petitioner has twice argued below, without success, that the challenged ban impermissibly curtails protected speech. Normally a claim of overbreadth would be appropriate under such conditions. Yet an overbreadth argument presupposes that the challenged ban has some stated bounds or limits. If one cannot determine its breadth, one can hardly claim that breadth to be excessive.

Had petitioner been about to appear before a jury, or even before the judge without a jury, the display of a prominent political message might arguably have compromised the impartiality of the tribunal or unacceptably distracted the course of judicial affairs. A general but narrow rule addressing precisely that risk, applicable to attorneys and other officers when they appear before the court, would not only provide clarity and guidance that are wholly lacking here, but would also reflect a substantial interest in the impartial administration of justice. *Cf. Gentile v. State Bar*, 501 U.S. 1030 (1991) (upholding such a standard though finding its application unconstitutionally vague in a particular case). An *ad hoc* ban that may be

imposed on any person, including spectators and attorneys -- at any time while court is in session -- exacts far too high a price in freedom of expression for whatever speculative assurance of the appearance of impartiality it might be thought to provide.

II. A COURTROOM IS NOT AN INHERENTLY IMPROPER FORUM FOR THE EXERCISE OF SILENT, NONDISRUPTIVE POLITICAL EXPRESSION THROUGH PERSONAL LAPEL BUTTONS; THE COURT OF APPEALS' UNDUE RELIANCE ON PUBLIC FORUM DOCTRINE DISREGARDED *BOARD OF AIRPORT COMMISSIONERS V. JEWS FOR JESUS* AND CONFLICTS WITH THE RULINGS OF TWO CIRCUIT COURTS.

Central to the court of appeals' reasoning was the special nature of a courtroom as an expressive site. Pet. App. 14a-18a. Having found petitioner's speech to be fully protected, the First Circuit gave great deference to respondent's judgment that it simply could not take place in his courtroom. Pet. App. 15a. "The courtroom," respondent declared in the initial exchange, "is not a political forum." Pet. App. 3a, 36a. The parties agreed that the courtroom in question was a nonpublic forum. Pet. App. 4a, 25a. That characterization poses but does not define the limits of expression tested here -- specifically, whether the display of a political button in the gallery is inherently

incompatible with decorum or the conduct of judicial business.

Curiously, the decisions of this Court afford relatively little guidance. Perhaps closest to the issue at hand is *Richmond Newspapers, Inc. v. Virginia*, where this Court spoke thus of the state trial courtroom:

> Subject to the traditional time, place and manner restrictions, streets, sidewalks, and parks are places traditionally open, where First Amendment rights may be exercised; a trial courtroom is also a public place where the people generally -- and representatives of the media -- have a right to be present, and where their presence historically has been thought to enhance the integrity and quality of what takes place.

448 U.S. 555, 578 (1980) (citations omitted). Thus, characterizing a courtroom as a nonpublic forum does not alter its basic character as a place to which the public has access -- or where basic freedoms of expression do apply. *Cf. Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976); *Cohen v. California*, 403 U.S. 15, 19 n. 3 (1971) (noting that the judge declined to hold Cohen in contempt when he appeared in the courtroom with the offending jacket folded over his arm).

The court of appeals relied on *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788 (1985), and *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983), for the proposition that restrictions on

speech in nonpublic fora need only be reasonable and viewpoint-neutral. Pet. App. 13a. It erred, however, in concluding that Judge Delahanty's *ad hoc* rule was either. *See* §§ III-V, *infra*. Moreover, it discounted this Court's warning in *Jews for Jesus* that "[m]uch nondisruptive speech -- such as the wearing of a T-shirt or button that contains a political message" is "still protected speech even in a nonpublic forum." 482 U.S. at 576 (citing *Cohen*, 403 U.S. 15).

Because there can rarely be a justification for forcing citizens to remove such unobtrusive, highly personal forms of political expression as lapel buttons, it does not matter whether the governmental property on which the citizen happens to be is a "public" or "nonpublic" forum; instead, "[t]he crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time." *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972).[5]

The private, silent wearing of a political button is not

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[5]*See also United States v. Grace*, 461 U.S. 171, 184-85 (1983) (Marshall, J., concurring in part and dissenting in part) ("Every citizen lawfully present in a public place has a right to engage in peaceable and orderly expression that is not incompatible with the primary activity of the place in question, whether that place is a school, a library, a private lunch counter, the grounds of a statehouse, the grounds of the United States Capitol, a bus terminal, an airport, or a welfare center.")

ordinarily "incompatible" with the "normal activity" of a courtroom. Indeed, were the law otherwise, a person garbed in an offensive jacket in a courthouse or children wearing armbands in a school setting could be prevented from exercising such expression because the activity did not occur in a public forum. (*See, Cohen*, 403 U.S. 15; *Tinker,* 393 U.S. 503.)

Two courts of appeals have recognized the limited relevance of public forum doctrine in addressing the First Amendment issues raised by bans on political buttons. In *United States v. Gilbert*, 920 F.2d 878 (11th Cir. 1991), the Eleventh Circuit modified an overly broad injunction that prohibited a homeless person from *any* First Amendment activity in the lobby of a federal court building. The *Gilbert* court ruled that government may not prohibit the wearing of message-bearing buttons inside a court building, even though it is a nonpublic forum and the prohibition is viewpoint-neutral. 920 F.2d at 886.

Similarly, in *Smith v. United States*, the court upheld a Veterans Administration ban on employees' wearing of political buttons when dealing with patients, because the ban was reasonably related to concerns about patient care, but it noted that employees were otherwise free to wear buttons on work premises. 502 F.2d 512, 518-19 (5th Cir. 1974).[6]

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[6]*See also Asociación Hospital del Maestro, Inc. v. NLRB*, 842 F.2d 575 (1st Cir. 1988) (invalidating ban on employees' wearing union insignia); *Goodman v. Kansas City*, 906 F. Supp. 537 (W.D. Mo. 1995) (invalidating ban on buttons and

The proper analysis did not turn on public forum doctrine but on whether there was any basis to predict a "material and substantial interference" of government operations. *Id.* at 518 (citing *Tinker*, 393 U.S. 503); *see also Frankel v. Roberts*, 165 A.D. 2d 382 (N.Y. App. Div. 1991) (court's order to attorneys to remove political buttons violated the First Amendment where there was no risk of harm to impartial administration of justice; the court applied balancing, not public forum, analysis).

In view of the highly personal, ordinarily unobtrusive and nondisruptive nature of lapel buttons, public forum doctrine is simply the wrong analytical tool for defining the constitutional limits on governmental authority to ban them. It is not only insufficiently sensitive to free speech interests, *see Jews for Jesus*, 482 U.S. at 576; it fails to take proper account of judicial concerns, which in some situations -- for example, a hotly contested political trial -- may indeed *call for* the suppression of particular messages in the courtroom precisely because of their viewpoint.[7]

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bumper stickers); *American Fed'n. of Govt. Employees v. Pierce*, 586 F. Supp. 1559 (D. D.C. 1984) (invalidating Veterans Administration ban on political buttons); *Kelly v. U.S. Postal Serv.*, 492 F. Supp. 121 (S.D. Ohio 1980) (invalidating ban on political buttons).

[7]As Professor Robert Post has pointed out, viewpoint discrimination may sometimes be appropriate when

The pivotal issue in this case is whether the concededly special nature of a courtroom forbids, or makes antithetical to impartial justice, the display of any political insignia, whether by officers of the court, spectators, or attorneys who are simply sitting in the gallery awaiting the calling of their case. Surely the disruption of the ongoing business of a court may be forbidden, as disruptive speech may be regulated in libraries, classrooms and other places where quiet and order are essential to protect a vital activity. A higher standard of decorum in matters of dress (at least for officers of the court) may be imposed in a courtroom than in a public park, or athletic arena, or airport. Thus, as this Court noted in *Cohen*, reversing a conviction under a general statute for the display of vulgar language, the case would have been different had the state sought to "preserve an appropriately decorous atmosphere in the courthouse." 403 U.S. at 19. Such a goal would have required "language in the statute that would have put appellant on notice that certain kinds of otherwise permissible speech or conduct would . . . not be tolerated in certain places." *Id.* The current case lacks not only such cautionary language in any pre-existing form; it also lacks any nexus between important regulatory interests and the particular message or activity in which petitioner had engaged.

What should be clear is that not all political speech of any type is inherently incompatible with the impartial

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government is acting within its "managerial domains." Robert Post, *Subsidized Speech*, 106 Yale L.J. 151 (1996).

operation of a courtroom -- though such an overly broad and prophylactic view seems to mark both respondent's and the lower courts' rulings. Whatever type of forum a courtroom may be (and it is at least a nonpublic forum) that characterization may not foreclose expressive activity of the most fully protected type, unless some basis has been shown to justify restraint. This case presents an opportunity to clarify the limits on public forum doctrine suggested in *Jews for Jesus*.[8]

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[8]Members of this Court have noted the problems with wooden overapplication of public forum doctrine. *See, e.g., International Society for Krishna Consciousness v. Lee*, 505 U.S. 672, 694-95 (1992) (Kennedy, Blackmun, Stevens, and Souter, J.J. concurring); *United States v. Kokinda*, 497 U.S. 720, 737-38 (1990) (Kennedy, J. concurring). There is also a large and persuasive scholarly literature criticizing the overuse of the doctrine. *E.g.,* Rosemary C. Salomone, *Public Forum Doctrine and the Perils of Categorical Thinking: Lessons from* Lamb's Chapel, 24 N.M. L. Rev. 1 (1994); G. Sidney Buchanan, *The Case of the Vanishing Public Forum*, 1991 U.Ill. L. Rev. 949; Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U.Chi. L. Rev. 46 (1987); Daniel A. Farber & John E. Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 Va. L. Rev. 1219 (1984).

III. THE COURT OF APPEALS DISREGARDED THE REQUIREMENT OF *GENTILE V. STATE BAR* THAT RESTRICTIONS ON SPEECH BY ATTORNEYS MUST AT LEAST BE JUSTIFIED BY SOME DEMONSTRABLE THREAT TO THE APPEARANCE OF IMPARTIAL JUSTICE.

At the time petitioner was summoned to the bench and told to remove his button, he was seated in the gallery. Respondent recognized him as an attorney, and apparently knew he was awaiting another case later on that day's docket. Yet there is no suggestion that anyone else in the courtroom made that connection -- much less that, if they had done so, they would have thought the judge biased in any way for not taking petitioner and his button to task. All we know is that respondent drew such a connection, though he of all people could not have feared the mere presence of the button in the gallery could compromise his administration of justice.

The case might be different if, for example, petitioner had insisted on displaying a highly visible political message during jury selection or any other phase of a jury trial. Similar conduct even during a non-jury trial might have threatened that atmosphere of impartiality so vital to due process, or could have created unacceptable distraction. But the facts of this case are a far cry from such a situation. Whether petitioner had planned to wear his button when his case was called, we do not know; such a possibility surely does not warrant upholding a sanction imposed upon him in the gallery, some time before his case came on for hearing.

Yet the ban on political insignia, both as applied to petitioner and apparently extended to other attorneys and spectators present in the court, was in no way limited to such displays. In fact, this case contains no suggestion of any threat of any kind to impartiality or to the appearance of impartiality in respondent's courtroom.

The court of appeals' ruling thus flatly conflicts with *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991). In *Gentile*, this Court upheld an attorney disciplinary rule that prohibited statements having "a substantial likelihood of materially prejudicing" an adjudicative proceeding. 501 U.S. at 1036. Four Justices argued for an even more exacting standard.[9] None suggested that mere speculation that a message worn by an attorney sitting in the gallery might be attributed to the court system was sufficient to suppress core political speech that was unrelated to any ongoing proceeding. *Gentile* thus demonstrates the unconstitutionality of a broad ban on political buttons where that ban is unrelated to any actual concern with fair judicial

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[9]Four justices also emphasized the clearly protected nature of "classic political speech" by attorneys, even when at odds with disciplinary standards: "[O]ur cases recognize that disciplinary rules governing the legal profession cannot punish activity protected by the First Amendment, and that First Amendment protection survives even when the attorney violates a disciplinary rule he swore to obey when admitted to the practice of law." *Gentile* 501 U.S. at 1054 (Kennedy, Marshall, Blackmun, and Stevens, J.J.).

administration.

A second feature of *Gentile* is equally basic: In recognizing limits that states may impose on attorneys' speech, this Court stressed the importance of sufficient specificity to guard against "the impermissible risk of discriminatory enforcement." 501 U.S. at 1051. Nevada's discipline in the particular case was set aside because the applicable model rule failed to put *Gentile* on notice that his speech was prohibited. *Id.* at 1050-1051. Had Nevada or any state sought to sanction attorney political speech without any explicit standards at all, such efforts would surely have failed on the most basic of First Amendment grounds.

Granting that a judge in a courtroom holds broader powers than a disciplinary board, there must be some basis to believe judicial administration is at risk before restricting silent, wholly nondisruptive political expression by an attorney or anyone else in the courtroom gallery. Thus the judgment of the court below fails in several important ways to meet this Court's most recent and relevant judgment in *Gentile,* as well as earlier precedents limiting judicial discretion to quash or punish political expression which does not in fact interfere with fair judicial administration. *Bridges v. California*, 314 U.S. 252 (1941); *Pennekamp v. Florida*, 328 U.S. 331 (1946); *Craig v. Harney*, 331 U.S. 367 (1947); *Wood v. Georgia*, 370 U.S. 375 (1962). As this Court noted in *In re Little*, courts "must be on guard against confusing offenses to their sensibilities with obstruction to the administration of justice." 404 U.S. 553, 555 (1972) (quoting *Brown v. United States*, 356 U.S. 148, 153 (1958)).

IV. THE COURT OF APPEALS IGNORED PRECEDENT IN THIS COURT AND CIRCUIT COURTS ESTABLISHING THAT PRIVATE EXPRESSION CANNOT BE ATTRIBUTED TO THE STATE AND THEN BANNED IN ORDER TO AVOID "THE APPEARANCE OF FAVORITISM."

The court of appeals approved Judge Delahanty's ban on political buttons worn by citizens in his courtroom based on unfocused, speculative concerns about the "appearance of favoritism" or "political partiality." Pet. App. 15a. There is, however, no basis to believe that political messages worn or otherwise expressed by private citizens would ordinarily be attributed to the state. As the D.C. Circuit has observed, if the law were otherwise, then a presumption of "government endorsement" would "serve as a sweeping antithesis to First Amendment rights in virtually every public place." *U.S. Southwest Afr./Namibia Trade and Cultural Council v. United States*, 708 F.2d 760, 772 (D.C. Cir. 1983).

In *Southwest Africa*, the Federal Aviation Administration attempted to justify its disapproval of political advertisements at two major airports by explaining that it feared members of the public would attribute the views of the advertiser to the government. *Id.* at 771. The court of appeals rightly rejected this "perceived endorsement" rationale as not credible and frankly "disturbing" in its implications for First Amendment rights. *Id.* at 772. Similarly, in *Tucker v. Cal. Dep't. of Educ.*, the Ninth

Circuit rejected a public employer's "perceived endorsement" defense to censorship policies imposed on the workplace. 97 F.3d 1204 (9th Cir. 19996). The court found it unlikely in that context that the employees' speech would be attributed to the employer. 97 F.3d at 1212-13.

The court of appeals' decision flatly conflicts with the rejection of "perceived endorsement" arguments in *Southwest Africa* and *Tucker*. Even more clearly than in the airport or public employment contexts, it is simply not credible to assume that members of the public sitting in a courtroom would confuse a private individual's (or even an attorney's) wearing of a political button with the views of the judge or the court system, or would in any way perceive that the political impartiality of the judiciary is compromised by permitting the diverse views of private individuals to be quietly displayed on lapel buttons.[10]

This Court has taken the same view in its Establishment Clause jurisprudence. In *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995), it rejected a defense to a First Amendment speech claim predicated upon the fear that a state university's funding of a student religious newspaper, in the context of a general student activity funding program, would be perceived as endorsing the newspaper's views. In *Capitol Square Review*

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[10]*Cf. Kelly v. Municipal Court*, 852 F.Supp. 724, 733-34 (S. D. Ind. 1994) (court *employee's* proselytizing and reading of the Bible in the courtroom could convey the impression that the court endorsed those particular religious beliefs).

& Advisory Bd. v. Pinette, 515 U.S. 753, 754 (1995), the Court noted that government does not promote or favor religious speech simply by allowing such speech access to public property. *See also Allegheny County v. ACLU*, 492 U.S. 573, 619 (1989). The court of appeals ignored the common sense, speech-protective reasoning of these Establishment Clause cases. Indeed, on the court of appeals' rationale, religious symbols worn by individuals present in court would also have to be banned for fear that they would compromise the appearance of governmental impartiality.

The court of appeals' alternative rationale, that a judge may order removal of a political button to minimize possible (but on this record wholly absent) "distraction" (Pet. App. 18a), is even vaguer and less related to any genuine interest in order or the impartial administration of justice than is its concern with "the appearance of political partiality." Pet. App. 15a. Such reasoning would give state judges essentially unlimited discretion to suppress nondisruptive expression -- not because it posed any risk to the administration of justice, but simply because they found it offensive. *Cf. In re Little*, 404 U.S. at 555.

V. PETITIONER CLAIMED, AND SHOULD BE ALLOWED TO PROVE, THAT THE CHALLENGED BAN WAS SELECTIVE AND VIEWPOINT-BASED.

In his complaint, petitioner alleged that certain messages (or message-bearing insignia) had been singled out

for special treatment. Pet. App. 30a. Specifically, he claimed that respondent "has routinely permitted the wearing in his courtroom of other ornamentation supporting causes, such as crucifixes and insignia for armed forces or fraternal orders." *Id.* Respondent's motion to dismiss concedes the validity of this allegation, and thus brings directly to bear the First Amendment's ban on selective or viewpoint suppression. Pet. App. 25a.

The allegation of selectivity clearly invokes this Court's holding in *Tinker v. Des Moines Independent School Dist.*, 393 U.S. 503 (1969), on strikingly similar facts. In challenging their suspension from public school for wearing black armbands to protest the Vietnam war, the *Tinker* plaintiffs prevailed on two grounds that have direct and substantial bearing here. First, this Court rejected the school board's claim that such expression was potentially disruptive in the absence of any evidence in the record which would have supported that claim. 393 U.S. at 508. Lacking such proof, said the Court, "our Constitution does not permit officials of the State to deny their form of expression." *Id.* at 514.

Second, the *Tinker* plaintiffs proved that, despite the facial neutrality of the board's ban, "school authorities did not purport to prohibit the wearing of all symbols of political or controversial significance." *Id.* at 510. Badges, buttons and insignia of other sorts had been allowed to be worn to school; only "a particular symbol . . . was singled out for prohibition." *Id.* at 510-11. The Court concluded: "Clearly the prohibition of expression of one particular opinion, at

least without evidence that it is necessary to avoid substantial interference with schoolwork or discipline, is not constitutionally permissible." *Id.* at 511. Surely such a standard, fashioned for student speech in the public schools, should be applicable to adults in a courtroom. The complaint in this case, fairly construed, alleges that respondent singled out Berner's political message opposing a referendum question while allowing many other sorts of message-bearing insignia.

Less clear until *Rosenberger,* but now equally suspect, are restraints upon entire categories of expression -- such as the political messages embraced by respondent's *ad hoc* ban in this case. In *Rosenberger*, this Court found impermissible viewpoint discrimination in a public university's refusal of funds for student publications that advanced religious messages. 515 U.S. at 845-46. A targeted ban confined to *political* messages would be at least as clearly invalid as *Rosenberger*'s discrimination against *religious* views.

As the Court explained in *Rosenberger*, political debate is not bipolar, and government action can "skew the debate" in "multiple ways." 515 U.S. at 831-32. Thus, the court of appeals took too narrow an approach to the viewpoint discrimination inquiry when it found respondent's ban to be viewpoint-neutral simply because there was no allegation that he had explicitly stated his antagonism to Berner's message, or had allowed people to wear messages conveying an opposite position on the specific referendum question. In fact, respondent's bias against Berner's message

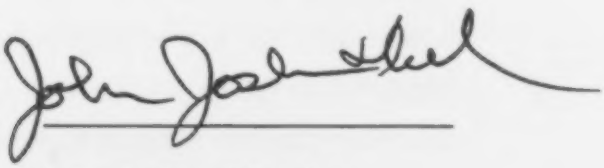
on the issue of sexual orientation, and in favor of conventional military and religious symbols that could reasonably be interpreted to assert less liberal views on the same issue, fundamentally "skewed" the silent "debate" that was taking place as these citizens went about their business while simultaneously engaging in the time-honored American practice of wearing their views on their sleeves or lapels.

Whether petitioner would prevail at trial on his claim of selective restraint is not now in issue. He seeks only the opportunity to prove that messages such as the one he displayed in the gallery have received harsher treatment than other comparable insignia worn in the very same courtroom. If government, in any form and at any level, has singled out a particular viewpoint or message, without a specific rule based upon the actual harm that such a message may cause, such suppression clearly abridges First Amendment freedoms.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,



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January 26, 1998

APPENDIX

United States Court of Appeals
For the First Circuit

No. 96-2122

SETH BERNER,
Plaintiff, Appellant,
v.
JUDGE THOMAS E. DELAHANTY, II,
Defendant, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MAINE
[Hon. Gene Carter, U.S. District Judge]

Before
Selya, Circuit Judge,
Aldrich and Campbell, Senior Circuit Judges.

Seth Berner, pro se.

Peter J. Brann, Assistant Attorney General, with whom Andrew Ketterer, Attorney General, and Thomas D. Warren, State Solicitor, were on brief, for appellee.

October 28, 1997

Selya, Circuit Judge. Attorney Seth Berner claims that lawyers have an absolute right, protected by the First Amendment, to wear political buttons in the courtroom as long as the buttons do not disrupt judicial proceedings. We reject that proposition and affirm the district court's dismissal of Berner's action for declaratory and injunctive relief.

I. BACKGROUND

The facts, drawn from the plaintiff's verified complaint and construed in his favor, see Dartmouth Review v. Dartmouth College, 889 F.2d 13, 16 (1st Cir. 1989), can be recounted readily. The defendant, Thomas E. Delahanty, II, is an associate justice of the Maine Superior Court. On October 31, 1995, Berner was seated in the gallery of Judge Delahanty's courtroom, waiting for his turn to appear before the court. Berner wore a circular button pinned to his lapel. The button was approximately two inches in diameter and bore the words **"No on 1 - Maine Won't Discriminate."** This legend expressed opposition to a statewide referendum that Maine voters were scheduled to consider during the November election.[1] Neither the pin nor its message were related to Berner's business before the court.

At some point during the day's proceedings, Judge Delahanty called Berner to the bench. The following exchange took place:

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[1]The referendum sought to prohibit the passage of laws that condemned discrimination on the basis of sexual orientation. It had been the subject of heated debate.

> **THE COURT**: Mr. Berner . . . Can you remove the political pen [sic] while you're in the courtroom?
>
> **ATTORNEY BERNER**: Your Honor, what happened to my right to political speech?
>
> **THE COURT**: Not in the courtroom. We don't take sides.
>
> **ATTORNEY BERNER**: I want the record to reflect that I don't think there's any authority for that.
>
> **THE COURT**: The courtroom is not - that may be, but the courtroom is not a political forum.
>
> **ATTORNEY BERNER**: Your honor, I want the record to reflect that I object to that.

Reasonably believing that he would be held in contempt if he did not comply with the court's order, Berner removed the button. During a chambers conference later that day, the judge told Berner that he planned to perpetuate the prohibition against lawyers wearing political buttons in his courtroom unless and until he was overruled by a higher authority.

Berner took refuge in the United States District Court, where he sought declaratory and injunctive relief pursuant to 42 U.S.C. § 1983 (1994). His rifle-shot complaint contained a single claim: that the button ban violated the First Amendment. In support of this claim Berner alleged that his button had not caused any disruption of the ongoing

proceedings and that Judge Delahanty "routinely permitted the wearing in his courtroom of other ornamentation supporting causes, such as crucifixes and insignia for armed forces or fraternal orders."

A flurry of motions ensued. The district court denied Berner's motion for a preliminary injunction, finding an insufficient likelihood of success on the merits. The court then addressed the defendant's motions to dismiss the action for lack of standing and failure to state an actionable claim. The court finessed the former by assuming, without deciding, that Berner had standing to sue. See Berner v. Delahanty, 937 F. Supp. 62, 62 (D. Me. 1996).

Turning to the legal sufficiency of the complaint, the court held that the controlling legal standard was the forum-specific analysis of Cornelius v. NAACP Legal Defense and Educ. Fund, Inc., 473 U.S. 788, 800 (1985) (discussing varying levels of scrutiny applicable to governmental restrictions on speech in different fora). See Berner, 937 F. Supp. at 63. Because the parties "agree[d] that the state courtroom is a nonpublic forum," Judge Carter found, consistent with Cornelius, that the decision to limit the wearing of political buttons "need only be: (1) reasonable in light of the purpose which the court serves and (2) viewpoint neutral." Id. Building on this premise, the judge concluded that the restriction on political paraphernalia was a reasonable attempt to "shield the courtroom from the inevitable appearance of politicization," and that there was "no indication that [Judge Delahanty] intended to discourage one viewpoint and advance another." Id. Since he perceived the

button ban to be a "reasonable viewpoint-neutral restriction," Judge Carter ruled that the complaint stated no claim upon which relief could be granted. Id.

On appeal, Berner assails the district court's analysis. He maintains that the court placed undue emphasis on Cornelius; that it erred in gauging the reasonableness of the ban; and, finally, that it failed to give appropriate weight to the defendant's tolerance of persons wearing other politically-tinged ornamentation.

II. SCOPE OF REVIEW

We evaluate de novo a district court's dismissal of an action for failure to state a cognizable claim. See Aulson v. Blanchard, 83 F.3d 1, 3, (1st Cir. 1996). In assaying such a dismissal, the appellate court, like the court that preceded it, must assume that the factual averments of the complaint are true and must draw all plausible inferences in the plaintiff's favor. See Leatherman v. Tarrant Cty. Narcotics Intell. & Coord. Unit, 507 U.S. 163, 164 (1993); Dartmouth Review, 889 F.2d at 16.

In this case, the district court gracefully sidestepped the standing inquiry, preferring instead a pas de deux directly with the merits of the complaint. While we recognize the occasional availability of such a terpsichorean course, see, e.g., United States v. Stroller, 78 F.3d 710, 715 (1st Cir. 1996) (explaining that a court may bypass a difficult jurisdictional question and instead dispose of the case on the merits if doing so favors the party challenging the court's jurisdiction); see also Rojas v. Fitch, ___ F.3d ___, ___ (1st

Cir. 1997) [No. 96-2328, slip op. at 7] (employing Stroller principle to sidestep an inquiry into standing), in this appellate lambada we are reluctant to follow suit. Standing is a threshold issue in every federal case and goes directly to a court's power to entertain an action. See Warth v. Seldin, 422 U.S. 490, 498 (1975); New Hampshire Right to Life Political Action Comm. v Gardner, 99 F.3d 8, 12 (1st Cir. 1996). Moreover, the general rule is that a court should first confirm the existence of rudiments such as jurisdiction and standing before tackling the merits of a controverted case. The exception discussed in Stroller is exactly that - an exception, which, in light of the danger that an ensuing decision on the merits might be rendered sterile by the tribunal's lack of authority to resolve the case, should be used sparingly. Resort should not be made to the exception where, as here, no substantial doubt attaches to the threshold issue. Hence, we choose to confront and resolve the standing question before proceeding to the merits.[2]

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[2]Shortly after the district court dismissed Berner's suit, Congress amended 42 U.S.C. § 1983 to provide "that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable." Pub. L. 104-317, § 309(c), 110 Stat. 3853 (1996). Judge Delahanty - presumably because Berner's complaint seeks declaratory as well as injunctive redress - neither moved for dismissal of the appeal nor raised the amendment as an alternate ground

III. STANDING

The criteria for standing are well-rehearsed. To establish that a dispute qualifies as an Article III "case" or "controversy," enabling it to obtain a federal court audience, the party seeking to invoke federal jurisdiction must first demonstrate that

> (1) he or she personally has suffered some actual or threatened injury as a result of the challenged conduct; (2) the injury can fairly be traced to that conduct; and (3) the injury likely will be redressed by a favorable decision from the court.

New Hampshire Right to Life, 99 F.3d at 13. We hasten to add, however, that the Court has placed a special gloss on cases in which a party seeks exclusively injunctive or declaratory relief. In such purlieus, standing inheres only if the complainant can show that he has suffered (or has been threatened with) "an invasion of a legally protected interest which is . . . concrete and particularized," Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992), together with "a sufficient likelihood that he will again be wronged in a similar way," City of Los Angeles v. Lyons, 461 U.S. 95, 111 (1983). In other words, the complainant must establish that the feared harm is "actual or imminent, not conjectural

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for affirming the judgment. Under the circumstances, it would serve no useful purpose for us to set sail, uninvited, on these uncharted waters.

or hypothetical." Lujan, 504 U.S. at 460 (citations and internal quotation marks omitted). It bears noting that the imminence concept, while admittedly far reaching, is bounded by its Article III purpose: "to ensure that the alleged injury is not too speculative." Id. at 564 n.2.

In addition to these benchmarks of constitutional sufficiency, standing doctrine "also embraces prudential concerns regarding the proper exercise of federal jurisdiction." United States v. AVX Corp., 962 F.2d 108, 114 (1st Cir. 1992). Under this rubric, courts generally insist that every complainant's tub rest on its own bottom. See id. (stating that a plaintiff ordinarily cannot sue to assert the rights of third parties). When the First Amendment is in play, however, the Court has relaxed the prudential limitations on standing to ameliorate the risk of washing away free speech protections. See Secretary of State of Md. v. Joseph H. Munson Co., 467 U.S. 947, 956 (1984). Hence, when freedom of expression is at stake:

> Litigants . . . are permitted to challenge a [policy] not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the [policy's] very existence may cause others not before the court to refrain from constitutionally protected speech or expression.

Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973).

Against this backdrop, Judge Delahanty strives to

persuade us that, even if Berner has standing to challenge the button ban as a past violation of his First Amendment rights (say, by a suit for money damages), he has no standing to seek declaratory and injunctive relief because there is no reasonable likelihood that he will again face similar harm. We are not convinced.

Berner is a member of the Maine bar and a full-time practicing lawyer who regularly handles litigation. Born in 1956, much of his career apparently lies ahead of him. Moreover, Maine is not California. The superior court is the principal statewide court of general jurisdiction, see Me. Rev. Stat. Ann. tit. 4, § 105 (West 1989), and its business is handled by a total of only 16 active judges. The law of averages strongly suggests that vocational demands will bring Berner before each and all of these judges in the months and years to come.

To cinch matters, the parties remain philosophically on a collision course. Berner's passion for political pins has not waned, and he has vowed that, when once again afforded the opportunity, he would not hesitate, but for Judge Delahanty's stated policy, to wear a political button in the jurist's courtroom. The judge, too, remains steadfast in his determination to prohibit attorneys from sporting such pins in his bailiwick.

On balance, the combination of facts reflected by the record persuades us that Berner faces a realistic risk of future exposure to the challenged policy. Such a risk is sufficient to satisfy not only the standing requirements that Article III imposes, but also the prudential concerns that sometimes

trouble courts. See DuBois v. United States Dep't of Agric., 102 F.3d 1273, 1283 (1st Cir. 1996); see also American Postal Workers v. Frank, 968 F.2d 1373, 1377 (1st Cir. 1992) (elucidating doctrinal parameters of Lyons).

In any event, Berner alleges that the button ban constitutes a threat not only to his own right to political speech but also to the rights of "other citizens." Thus, even if these particular parties' paths were not likely to cross again, Berner might well be able to invoke the federal courts' jurisdiction to seek equitable relief based on the "judicial prediction" that the policy may chill the general exercise of free speech. Broadrick, 413 U.S. at 612. Judge Delahanty's prohibition apparently applies to every court officer, and we are not so struthious as to hide our eyes from the probability that as a result of such a policy, other attorneys will refrain from expressing opinions by wearing political paraphernalia when appearing before this judge. In itself, this can be a sufficiently concrete and particularized injury to First Amendment protections to ground a claim of standing. See Virginia v. American Booksellers Ass'n, Inc., 484 U.S. 383, 392-93 (1988).

IV. THE MERITS

In attempting to ascertain whether the district court erred in granting the defendant's motion to dismiss the action for failure to state a claim, Fed. R. Civ. P. 12(b) (6), we must assume that the complaint's factual averments are true and determine from that coign of vantage whether the pleading encompasses any set of facts that would entitle the

plaintiff to relief. See Correa-Martinez v. Arrillaga-Belendez, 903 F.2d 49, 52 (1st Cir. 1990) (explaining that an affirmance of a Rule 12(b) (6) dismissal is appropriate "only if it clearly appears, according to the facts alleged, that the plaintiff cannot recover on any viable theory"). Although this standard is diaphanous, it is not a virtual mirage. To survive a motion to dismiss, a complaint must set forth "factual allegations, either direct or inferential, respecting each material element necessary to sustain recovery under some actionable legal theory." Gooley v. Mobil Oil Corp., 851 F.2d 513,515 (1st Cir. 1988). It is, moreover, settled that in judging the adequacy of a plaintiff's allegations, "bald assertions, periphrastic circumlocutions, unsubstantiated conclusions, [and] outright vituperation" carry no weight. Correa-Martinez, 903 F.2d at 52.

These rules of pleading and practice cannot be applied in a vacuum. Thus, to evaluate properly the sufficiency of Berner's complaint, we first construct a template that comprises the averments necessary to state a claim for violation of the First Amendment in this context. We then proceed to measure the facts that Berner alleges in his complaint[3] against this template to ascertain whether those

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[3]Rule 12(b) (6) provides in pertinent part that if, on a motion to dismiss, "matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56." Here, the parties submitted affidavits subsequent to the filing of the complaint, but the district

facts, if proven, suffice to establish an entitlement to relief.

A. The First Amendment Framework.

It is axiomatic that not every limitation on freedom of expression insults the First Amendment. A curtailment of speech violates the Free Speech Clause only if the restricted expression is, in fact, constitutionally protected, see Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942), and if the government's justification for the restriction is inadequate, see International Soc'y for Krishna Consciousness v. Lee, 505 U.S. 672, 678 (1992).[4]

In Cornelius, the Court articulated a three-tiered, forum-based test for determining when the government's interest in limiting particular property to its intended purpose outweighs the interests of those who wish to use the property for expressive purposes:

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court apparently did not rest its decision in any way on these materials (and, thus, effectively excluded them). This course of action lay within the court's discretion, see Garita Hotel Ltd. Partnership, Etc. v. Ponce Fed. Bank, 958 F.2d 15, 18-19 (1st Cir. 1992), and we guide our analysis accordingly.

[4]The adequacy of the government's justification is measured on a sliding scale. Generally speaking, the nature of the forum in which the speech is restricted dictates the level of scrutiny required. See International Soc'y for Krishna Consciousness, 505 U.S. at 678-79; United States v. Kokinda, 497 U.S. 720, 726-27 (1990).

> [S]peakers can be excluded from a public forum only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest. Similarly, when the Government has intentionally designated a place or means of communication as a public forum speakers cannot be excluded without a compelling governmental interest. Access to a nonpublic forum, however, can be restricted as long as the restrictions are reasonable and [are] not an effort to suppress expression merely because public officials oppose the speaker's view.

Cornelius, 473 U.S. at 800 (citations and internal quotation marks omitted); accord Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45-46 (1983). Thus, when a plaintiff seeks to launch a First Amendment challenge addressed to a policy or practice that restricts expressive activity on public property, he must plead facts sufficient to show (1) that the government has burdened a protected form of speech, and (2) that the restriction is unreasonable (which, in a nonpublic forum, may involve showing that the restriction is biased, and, in public or limited public fora, may involve showing that it is not narrowly drawn to further a compelling state interest).

The appeal before us arises in a slightly awkward posture. Ordinarily, a complaint, standing alone, will not provide a suitable vehicle for evaluating the adequacy of the

government's justification for restricting speech. In some instances, however, the government's rationale is either clearly stated in the restriction itself or plain from even a cursory examination of the restriction. If the justification is apparent and is plausible on its face, a complainant who hopes to survive a motion to dismiss must do more than suggest conclusorily that the state has an improper or insufficient motivation. Rather, the complainant must allege facts that, if proven, would support, directly or by fair inference, a finding that the state's justification falls short of the applicable legal standard.

B. The Sufficiency of the Complaint.

We turn now to the sufficiency of the instant complaint. As to the nature of the speech, we conclude that the complaint adequately alleges infringement of a constitutionally protected form of expression - the plaintiff's right to advocate a particular political position by wearing an emblem. See Board of Airport Commissioners v. Jews for Jesus, 482 U.S. 569, 576 (1987); Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 505 (1969). Such political expression is typical of the broad spectrum of symbolic acts that the Free Speech Clause of the First Amendment is designed to protect.

Berner does not fare as well when the spotlight shifts to the apparent justification for the restriction. A courthouse - and, especially, a courtroom - is a nonpublic forum. See United States v. Bader, 698 F.2d 553, 556 (1st Cir. 1983); Claudio v. United States, 836 F. Supp. 1219, 1224-25

(E.D.N.C. 1993), aff'd, 28 F.3d 1208 (4th Cir. 1994). A courtroom's very function is to provide a locus in which civil and criminal disputes can be adjudicated. Within this staid environment, the presiding judge is charged with the responsibility of maintaining proper order and decorum. In carrying out this responsibility, the judge must ensure "that [the] courthouse is a place in which rational reflection and disinterested judgment will not be disrupted." Ryan v. County of DuPage, 45 F.3d 1090, 1095 (7th Cir. 1995). We think it is beyond serious question that the proper discharge of these responsibilities includes the right (and, indeed, the duty) to limit, to the extent practicable, the appearance of favoritism in judicial proceedings, and particularly, the appearance of political partiality. Cf. Greer v. Spock, 424 U.S. 828, 839 (1976) (finding that a ban on political speeches and demonstrations on military bases "is wholly consistent with the American constitutional tradition of a politically neutral military establishment under civilian control").

Judge Delahanty's order compelling Berner to remove his political-advocacy button while in the courtroom fits comfortably within this apolitical paradigm. Emblems of political significance worn by attorneys in the courtroom as a means of espousing personal political opinions can reasonably be thought to compromise the environment of impartiality and fairness to which every jurist aspires. As an officer of the court, a lawyer's injection of private political viewpoints into the courtroom, coupled with the judge's toleration of such conduct, necessarily tarnishes the veneer

of political imperviousness that ideally should cloak a courtroom, especially when the partisan sentiments are completely unrelated to the court's business.

Here, Judge Delahanty stated clearly that he was ordering Berner to remove the button because participants in the judicial process ought not simultaneously "take sides" in extraneous political debates.[5] This explanation is entirely consistent with a desire to ensure that the courtroom remains free from the appearance of political partisanship. Evaluating the professed justification, as we must, "in light of the purpose of the forum and all the surrounding circumstances," Cornelius, 473 U.S. at 809, we discern no reason why a judge may not even-handedly prohibit lawyers from wearing political paraphernalia in the courtroom.

Berner labors mightily to supply such a reason. Most notably, he asseverates that, regardless of the form and function of the courtroom, it is unreasonable to prohibit political pins that do not have the effect of disrupting judicial proceedings. As support for this thesis, he directs us to the Court's opinion in Jews for Jesus. He emphasizes that the Justices there invalidated a ban which, among other things, proscribed "nondisruptive speech - such as the wearing of a T-shirt or button that contains a political message." 482 U.S at 576. Berner's reliance on Jews for Jesus is mislaid.

That case involved an overbreadth challenge to a

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[5]We consider Judge Delahanty's statements only insofar as they are reflected in the transcript appended to and incorporated by reference in the plaintiff's complaint.

municipal ordinance which, on its face, "reache[d] the universe of expressive activity, and, by prohibiting all protected expression, purport[ed] to create a virtual 'First Amendment Free Zone' at [a major airport]." Id. at 575. Not surprisingly, the Court held that, even if an airport is a nonpublic forum, no government interest could justify excluding all forms of protected expression from that locale. See id. The prohibition here is hardly of such unbridled scope, and, in all events, the plaintiff has not attacked it as overbroad or vague. In addition, an airport terminal, in which free expression presumably would have been allowed absent the challenged ordinance, differs substantially from a courtroom, in which "whatever right to 'free speech' an attorney has is [already] extremely circumscribed." Gentile v. State Bar of Nevada, 501 U.S. 1030, 1071 (1991). For these reasons, Jews for Jesus is inapposite.

Stripping away the authority on which Berner relies still leaves intact his bareboned contention that it is unreasonable to restrict non-disruptive speech. As applied to courtrooms, we think that this view is much too myopic.

In the first place, the danger of disturbing a court's proceedings is only one acceptable justification for restricting protected free speech. There are others. So here: even though Berner's button caused no commotion, his mere wearing of a pin that advocates a position regarding a hotly contested political issue raises the specter of politicalization and partiality. Mindful of the purposes of the courtroom and Berner's role as an officer of the court, we conclude that it was reasonable for the judge to bar Berner's political

statement regardless of whether it created a stir. See Cornelius, 473 U.S. at 809 (finding that "avoiding the appearance of political favoritism is a valid justification for limiting speech in a nonpublic forum").

There is, moreover, a broader justification. By their nature, courtrooms demand intense concentration on important matters. Whether or not disruptive, buttons that display political messages are at the very least distracting. Lawyers who wear such emblems serve not only as vocal advocates for their clients in matters before the court, but also as active promoters of their own political agendas. If a presiding judge turns a blind eye to attorneys' espousals of political sentiments unrelated to ongoing proceedings, clarity and continuity may well suffer. Hence, judges may take reasonable prophylactic measures to minimize such distractions.

As a fallback position, Berner maintains that Judge Delahanty's policy is not viewpoint neutral because the defendant banned his button despite having allowed other emblems in the courtroom, and that this lack of neutrality violates the First Amendment. We disagree. The essence of viewpoint-based discrimination is the state's decision to pick and choose among similarly situated speakers in order to advance or suppress a particular ideology or outlook. See Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 393-94 (1993); Cornelius 473 U.S. at 806. Although the Free Speech Clause may not prevent government officials from restricting an entire category of speech based on its content, it does preclude such officials

from selectively granting safe passage to speech of which they approve while curbing speech of which they disapprove. See e.g., Burnham v. Ianni, 119 F.3d 668, 676 (8th Cir. 1997); Gay Lesbian Bisexual Alliance v. Pryor, 110 F.3d 1543, 1549 (11th Cir. 1997).

This requirement of viewpoint neutrality prohibits the state both "from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction," Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 829 (1995), and from treating differently comparable means of expression when the nature of the speech is the linchpin of the limitation, see AIDS Action Comm. of Mass., Inc. v. Mass. Bay Transp. Auth., 42 F.3d 1, 9-12 (1st Cir. 1994).[6]

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[6]In AIDS Action Committee, the defendant, a state agency, refused to allow the plaintiff to post public service announcements that used "sexual innuendo and double entendre to communicate its message" anent the use of condoms "while simultaneously permitting other advertisers to communicate their messages through these modes of expression." 42 F.3d at 10. The panel compared the permitted and prohibited advertisements, focusing particularly on whether they displayed sexual images at equivalent levels of explicitness, and concluded that the two sets of advertisements were equally suggestive. The panel then ruled that the defendant's differential treatment of similarly suggestive advertisements constituted "content discrimination which gives rise to the appearance of viewpoint discrimi-

This case does not implicate either of these iterations.

There is simply no basis in the complaint for an inference that ideology sparked the button ban. The closest that the complaint comes is an averment that, despite outlawing Berner's pin, the "[d]efendant has routinely permitted the wearing in his courtroom of other ornamentation supporting causes, such as crucifixes and insignia for armed forces or fraternal orders." Taken as true, this averment is not sufficient to sustain a claim of viewpoint discrimination because Berner does not allege that the banishment of his political pin had anything to do with the message emblazoned on his button or that the causes promoted by the permitted symbols bear an ideological relation to his own button-backed political viewpoint such that allowing these other emblems in the courtroom but excluding his pin rationally may be seen as a discriminatory attempt to stifle his opinion.

Nor can the plaintiff convincingly mount a claim of viewpoint bias based on the prohibition of his political speech in the courtroom without a corresponding disallowance of military and religious ornamentation (which, in his view, also advance political causes). The lesson of AIDS Action Committee is that an inference of viewpoint discrimination sometimes can be drawn when the proscribed speech and the permitted speech are alike in ways that undermine the justification asserted in support of the restriction. Here, however, the stated justification is to avoid the appearance of

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nation" in violation of the First Amendment. Id. at 11.

political partiality, and Berner's allegations do not in any way impeach that justification. No substantial equivalency exists between political buttons, on the one hand, and military and religious emblems, on the second hand. A political button has only a single purpose: to express a view on a political candidate or cause. In contrast, miliary and religious symbols, standing alone, do not expressly advocate a particular political position, and, at best, are subject only to secondary political connotations. Such adornments have multiple meanings, including but not limited to conveying allegiance to a particular institution or a broad band of convictions, values, and beliefs. Thus, because restraining partisan expression in the neutral environ of a courtroom is a legitimate goal, a judge reasonably may decide to prohibit pins that primarily and expressly champion specific political stances and at the same time permit the wearing of military and religious accessories.[7] In the circumstances of this case, the decision not to bar such tokens does not compromise the propriety of an otherwise permissible prohibition precluding political paraphernalia.

To say more would be supererogatory. Based on the allegations of the plaintiff's complaint, no inference of viewpoint bias reasonably can be drawn.

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[7]This case does not require us to address the question of whether, and if so, under what circumstances, a judge has the power to exclude military and religious insignia. We leave that question for another day.

V. CONCLUSION

We need go no further.[8] An attorney is free, like all Americans, to hold political sentiments. In a courtroom setting, however, lawyers have no absolute right to wear such feelings on their sleeves (or lapels, for that matter). Judge Delahanty's policy of prohibiting all political pins is a reasonable means of ensuring the appearance of fairness and impartiality in the courtroom, and the plaintiff has made no supportable allegation that the restriction is viewpoint based. Consequently, Berner's complaint fails to state a claim upon which relief can be granted.

Affirmed.

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[8]In this venue, Berner argues, for the first time, that Cornelius does not supply the appropriate legal guidepost for this case. In Berner's newly-emergent view, Cornelius should be read to affect limitations on access to public or nonpublic fora, but not to affect limitations on speech. Although we are tempted to hold explicitly that this access/speech dichotomy is made up out of whole cloth, we take a simpler route. In the district court, Berner acknowledged Cornelius's suzerainty and conceded relevant and substantial portions of the ensuing analysis. Consequently, he has forfeited his right to argue a new, much different theory on appeal. See McCoy v. Massachusetts Inst. of Tech., 950 F.2d 13, 16 (1st Cir. 1991); Clauson v. Smith, 823 F.2d 660, 666 (1st Cir. 1987).

U.S. DISTRICT COURT
PORTLAND, MAINE
RECEIVED AND FILED
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BY: s/ G
DEPUTY CLERK

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

SETH BERNER,

Plaintiff

v. Civil No. 96-83-P-C

THOMAS DELEHANTY [sic],

Defendant

MEMORANDUM OF DECISION AND ORDER
GRANTING DEFENDANT'S MOTION TO DISMISS

Plaintiff Seth Berner is an attorney licensed to practice in Maine. Complaint ¶ 5. Defendant Thomas Delehanty [sic] is a justice sitting on the Maine Superior

Court. Complaint ¶ 4. On October 31, 1995, Plaintiff appeared in Defendant's courtroom wearing on his lapel a political button in connection with a then-up-coming ballot question for the November election. Complaint ¶¶ 5, 7, 8; Complaint Ex. A. The Plaintiff alleges that he was "instructed" to remove his button. Complaint ¶ 13. The transcript attached to the Complaint reveals that Justice Delehanty [sic] inquired of Plaintiff: "Can you remove the political pin while you're in the courtroom?" The Plaintiff then removed the political button, and responded in protest: "Your honor what happened to my right to political speech?" Justice Delehanty [sic] stated: "Not in the courtroom. We don't take sides. .... The courtroom is not a political forum."

Plaintiff subsequently filed this action alleging that the request to remove the button violated his rights under the First Amendment and requesting injunctive relief in order to enjoin Defendant from prohibiting the wearing of political buttons in his courtroom unless it interferes with the ongoing court business and declaratory relief as the Court deems necessary. On May 15, 1996, this Court denied Plaintiff's request for preliminary injunctive relief. Docket No. 13. Defendant moves for judgment of dismissal on the pleadings under Fed. R. Civ. P. 12(b) (1) and 12 (b) (6). Docket No. 6. For the reasons that will be explained below, the Defendant's Motion to Dismiss will be granted.

Defendant argues that Plaintiff lacks standing to seek either declaratory or injunctive relief. Defendant's Motion to Dismiss and Defendant's Opposition to Plaintiff's Motion

for Preliminary Injunction (Docket No. 4) at 4. In the interest of judicial economy, the Court will assume, without deciding, that Plaintiff has standing to bring this action.

To resolve Defendant's Motion to Dismiss, the Court must accept as true all factual allegations in the Complaint, construe them in favor of Plaintiff, and decide whether, as a matter of law, Plaintiff could prove any set of facts which would entitle him to relief. See Roeder v. Alpha Industries, Inc., 814 F.2d 22, 25 (1st Cir. 1987); Gott v. Simpson, 745 F. Supp. 765, 768 (D. Me. 1990). Both parties agree that the state courtroom is a nonpublic forum. Plaintiff's Memorandum of Law in Support of Objection to Defendant's Motion to Dismiss (Docket No. 8) at 6; Defendant's Opposition to Plaintiff's Motion for preliminary Injunction at 10. Because the courtroom is a nonpublic forum, Judge Delehanty's [sic] decision to limit the Plaintiff's wearing of the political button need only be; (1) reasonable in light of the purpose which the court serves and (2) viewpoint neutral. See Cornelius v. NAACP Legal Defense & Educational Fund Inc., 473 U.S. 788, 806 (1984).

First, the Court will consider whether the curtailment here was reasonable given the court's legitimate interest in "preserv[ing] the property . . . for the use to which it is lawfully dedicated." Perry Ed. Ass'n. v. Perry Local Educators' Ass'n., 460 U.S. 37, 50 (1983) (citations omitted). "A courtroom is not a debate hall or a gathering place for the public to exchange ideas; it is a forum for adjudicating the rights and duties of litigants." Kelly v. Municipal Court of Marion County, 852 F. Supp. 724, 735

(S.D. Ind. 1994). In order to achieve this goal, judges strive, through the judicial process, to provide an environment of absolute fairness. Moreover, "[i]n contrast to discourse in public fora, discussions that occur in court are highly regulated by rules of evidence and procedure." Id. Accordingly, Judges must be given a wide latitude to determine what is inconsistent with the court's mission or what is necessary to create an environment to achieve that mission. Given the purpose to which courtrooms are dedicated, it was reasonable for Judge Delehanty [sic] to shield the courtroom from the inevitable appearance of politicization created by attorney Berner's button.

In support of his position, Plaintiff relies on Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969), where the Supreme Court held that the school district could not prevent students from wearing black arm bands to exhibit their disapproval of the war in Vietnam. The Court concluded that "the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible." Id. at 511 (emphasis added). Plaintiff argues that his button, like the arm bands in Tinker, did not interfere with the courtroom proceedings or disrupt the progress of the court calendar.

Tinker, however, is distinguishable. In reaching its decision, the Tinker Court also considered that the policy instituted by school authorities was not facially neutral. Id. at 510 ("It is also relevant that the school authorities did not

purport to prohibit the wearing of all symbols of political or controversial significance."). In this case, although Plaintiff's button was not causing a disruption of court business, there is no indication that the judge intended to discourage one viewpoint and advance another. On the contrary, Judge Delehanty [sic] frankly stated: "We don't take sides." Given the purpose to which courtrooms are dedicated, Justice Delehanty's [sic] request that Plaintiff remove the political button while he was in the courtroom was a reasonable viewpoint-neutral restriction.

Accordingly, it is ORDERED that Defendant's Motion to Dismiss be, and is hereby, GRANTED and it is hereby ORDERED that Plaintiff's Complaint be, and it is hereby, DISMISSED.

s/Gene Carter
GENE CARTER
Chief Judge

Dated at Portland, Maine this 16th day of September, 1996.

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

SETH BERNER
Plaintiff

v.

VERIFIED COMPLAINT FOR INJUNCTIVE RELIEF WITH INCORPORATED MOTION FOR PRELIMINARY INJUNCTION

THOMAS DELAHANTY
in his professional capacity
Defendant

NATURE OF THE CASE

1. This is a civil action brought pursuant to 42 U.S.C. §1983 for injunctive relief for violation of the Constitution and laws of the United States. Plaintiff seeks a preliminary and permanent injunction against Defendant State judge's blanket prohibition of the wearing of political buttons in his courtroom as violative of the First Amendment to the United States Constitution.

2. Jurisdiction is based on 28 U.S.C. §1343. Injunctive relief is authorized by 28 U.S.C. §§2201 and 2202 and by Federal Rule of Civil Procedure 65.

PARTIES

3. Plaintiff Seth Berner is an individual residing in

the City of Portland, County of Cumberland, State of Maine.

4. Defendant Thomas Delahanty is a Justice of the Superior Court of the State of Maine.

GENERAL ALLEGATIONS

5. On or about October 31, 1995 Plaintiff, an attorney licensed to practice law in the State of Maine, was in a courtroom of the Superior Court for the State of Maine sitting in Cumberland County on legitimate court business.

6. The matters before the court during that session, including Plaintiff's, were all to be resolved by a judge alone; no jury or other factfinder was involved.

7. On the lapel of his suit jacket Plaintiff was wearing a pinback-type button two inches in diameter bearing the words "No on 1 - Maine Won't Discriminate." See Exhibit A attached.

8. Plaintiff's button was an official and authorized form of promotion for the "no" position on a statewide referendum on the ballot throughout Maine in the November, 1995 election.

9. At all times material hereto Plaintiff was not engaged in any advocacy for the position promoted by his button other than the wearing of the button: he was not carrying any signs, distributing any materials or discussing the issue with persons in the courtroom.

10. At all times material hereto Plaintiff was quietly and respectfully waiting for his case to be called by the court for its attention.

11. No one present in the courtroom was visibly provoked by Plaintiff's button, and at all times material hereto court business was conducted in an orderly manner without any interruption caused by Plaintiff or his button.

12. Defendant was the presiding justice for the session of court Plaintiff was attending.

13. Defendant called Plaintiff to approach the bench and when Plaintiff was at sidebar instructed Plaintiff to remove his button.

14. When Plaintiff responded to this by suggesting that the court lacked the authority for such a command Defendant replied "... that may be, but the courtroom is not a political forum." See Exhibit B attached.

15. Defendant made Plaintiff believe that he would be held in contempt of court if he did not comply.

16. When the court session was completed Plaintiff met in chambers with Defendant who there repeated that he did not know whether he had authority to prohibit the wearing of political buttons but that such would continue to be the rule of his courtroom until he was ordered by a higher authority to desist.

17. Defendant has routinely permitted the wearing in his courtroom of other ornamentation supporting causes, such as crucifixes and insignia for armed forces or fraternal orders.

18. Daniel E. Wathan, the Chief Justice of the Supreme Judicial Court of the State of Maine, responded to a request that he review the situation by stating that there are no rules regulating the contempt powers of Maine judges;

that judges should have wide discretion in such matters; and that an aggrieved party could resort to the appellate or disciplinary process. See Exhibit C attached.

COUNT 1

19. Plaintiff repleads paragraphs 1-18 supra as though set forth in full herein.

20. Political speech is entitled to the greatest protection under the First Amendment of the United States Constitution.

21. Wearing a button taking a position on an issue on a public ballot is political speech.

22. Defendant's blanket prohibition against the wearing of political but not other buttons is a regulation of speech based on its content.

23. Defendant's blanket prohibition against the wearing of political buttons in his courtroom regardless of whether a particular button is causing a disturbance or otherwise interfering with court business serves no legitimate state interest.

24. Defendant's conduct deprived Plaintiff of a right guaranteed by the First Amendment of the United States Constitution.

25. Defendant's stated intention to conduct himself in the same way in the future constitutes a threat to the right of Plaintiff and other citizens to political speech under the First Amendment to the United States Constitution.

26. An individual ordered to remove a political button that is not causing a disturbance has no adequate

remedy at law - by the time appellate or disciplinary proceedings are completed the effectiveness of the speech will have been diminished by the reduction of the opportunities for people to "hear" it, and the speech may be mooted by the completion of the election in question.

27. The threatened harm to Plaintiff and other citizens outweighs any harm the Defendant would suffer if the requested relief is granted.

28. The public interest requires that relief be granted on an expedited basis, either by the granting of a preliminary injunction or by the expedited entry of a permanent injunction, to ensure that the right to political speech is not denied during the election season already underway. Accordingly, Plaintiff MOVES that this Court either grant a preliminary injunction or give priority to Plaintiff's prayer for a permanent injunction.

WHEREFORE, Plaintiff prays that he be granted the following relief:

a) Defendant be preliminarily and permanently enjoined from prohibiting the wearing of political buttons in his courtroom unless a specific button is actually causing a disturbance; unless there is actual probable cause to believe that a disturbance will result if the wearing is not prohibited; or unless the button is otherwise interfering with the fair and dignified administration of justice.

b) Plaintiff be awarded his attorney's fees pursuant to 42 U.S.C. §1981 [sic].

c) This Court enter such other orders as are necessary

and just.

Respectfully submitted on this March 29, 1996

s/Seth Berner
Seth Berner, Esq.
Bar. No. 1029
Plaintiff *Pro Se*
P.O. Box 4809
Portland, ME 04112
775-2452

STATE OF MAINE
Cumberland, ss

Before me appeared Seth Berner, known to me personally, and swore under oath that the statements recited in his Complaint are true and based on personal knowledge unless otherwise stated, and that he believes to be true those statements that are based on belief.

s/Lucy Getchell
Notary Public

seal

Lucy Getchell
Printed Name

[NOTE: Exhibit A to the Complaint was in fact attached to the Complaint, although the document mistakenly states that it was attached to the Memorandum of Law in Support of Preliminary and Permanent Injunctive Relief.]

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

SETH BERNER
Plaintiff

v.

THOMAS DELAHANTY
in his professional capacity
Defendant

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF PRELIMINARY AND PERMANENT INJUNCTIVE RELIEF: EXHIBIT A

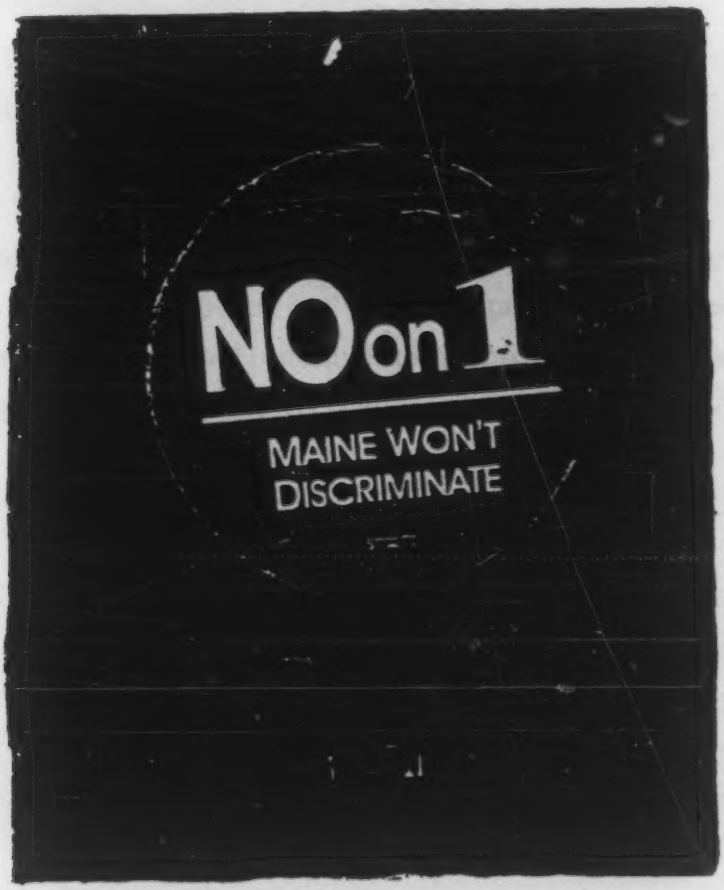

EXHIBIT B

(The following exchange between the Court and counsel, Seth Berner, Esq., took place on the morning of October 31, 1995.)

THE COURT: Mr. Berner, can I see you at the bench, please?

(Mr. Berner comes to the sidebar)

Can you remove the political pen [sic] while you're in the courtroom?

MR. BERNER: Your Honor, what happened to my right to political speech?

THE COURT: Not in the courtroom. We don't take sides.

MR. BERNER: I want the record to reflect that I don't think there's any authority for that.

THE COURT: The courtroom is not --- that may be, but the courtroom is not a political forum.

MR. BERNER: Your Honor, I want the record to reflect that I object to that

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The foregoing is a true transcript of my stenographic notes of the exchange between the Court and counsel.

s/Arlene T. Edes

Arlene T. Edes, Court Reporter

EXHIBIT C

STATE OF MAINE

SUPREME JUDICIAL COURT

AUGUSTA, MAINE 04330

Daniel E. Wathen
Chief Justice

MAILING ADDRESS:
Judicial Center
65 Stone Street
Augusta, Maine 04330
Tel: (207) 287-6950
Fax: (202) 287-4641

February 20, 1996

Sally Sutton, Executive Director
Maine Civil Liberties Union
97A Exchange St.
Portland, Maine 04101

Re: Regulation of Free Speech in Courtroom Settings

Dear Ms. Sutton:

I finally had an opportunity to discuss your letter of November 17 at a recent meeting of the Chief Judges and the State Court Administrator. The only "rule" that we have at present is the attached policy regarding advertising. Beyond that, judges have the obligation to insure legal proceedings are fair and dignified.

The power of contempt affords them wide discretion in regulating conduct within the courtroom and that discretion is subject to review through the appellate process and through the disciplinary process. Although organizations, such as the National Judicial College, have

published books on the subject of inherent powers and contempt (see *Inherent Powers of the Courts*, Felix F. Stumpf), I am not aware that any organization has undertaken the monumental task of codifying the parameters of the power of contempt. Obviously, the issue is very fact specific and it is difficult to fashion general principles that cover the situations that arise in the course of individual proceedings.

I recall several years ago that there were defendants who attempted to display bumper stickers in the courtroom denigrating the grand jury process. In the recent O.J. Simpson trial, I believe that the presiding judge required Marsha Clark to remove a lapel pin. It was a golden angel. Apparently that is a symbol that is sometimes used by those interested in the problem of domestic violence. Quite frankly, the Chiefs and I concluded that this is not an appropriate area for rule-making, it has not been an area of significant controversy, and should be left to the discretion of the trial judge subject to review. If you feel differently, I would be willing to discuss this further with you or your Board. I enclose a transcript of that portion of the proceedings that gave rise to Mr. Berner's complaint.

Thank you for calling this matter to my attention and please feel free to contact me if anything further is required.

Sincerely yours,
s/Daniel E. Wathen
Daniel E. Wathen
Chief Justice

DEW/lm
Enclosure